

This is a claim for a May 28, 2009, accident. In the January 3, 2011, Award, ALJ Avery determined that claimant sustained a personal injury by accident that arose out of and in the course of his employment with respondent. The ALJ also determined claimant

is essentially and realistically unemployable and, therefore, is permanently and totally disabled. ALJ Avery awarded claimant permanent total disability benefits.<sup>1</sup>

Respondent does not dispute that claimant was involved in an accident on or about May 28, 2009, but it does dispute that, (1) claimant has any permanent impairment, and (2) claimant is permanently and totally disabled as a result of the work accident. At oral argument, respondent's counsel stipulated claimant suffered an injury arising out of and in the course of his employment on May 28, 2009, but denied claimant has any permanent impairment as a result of the accident and further denied that claimant is permanently totally disabled. Respondent's counsel also stipulated at oral argument to both the task loss and wage loss of the claimant as set out in the report of Terry Cordray, vocational rehabilitation expert. Respondent's counsel also stipulated at oral argument that it received timely notice of the accident. Respondent requests the Board reverse the Award and deny compensation to the claimant based on a finding that claimant did not sustain an injury resulting in permanent impairment during the course and scope of his employment.

Claimant argues he has sustained his burden of proving that he suffered a work-related injury and that he is permanently and totally disabled. In his submission letter to the ALJ, claimant asserts he is entitled to work disability due to the accident. Claimant requests the Board affirm the Award. At oral argument claimant's counsel agreed claimant was no longer asserting that he is entitled to the payment of additional past medical bills.

The issues before the Board on this appeal are:

1. Did the claimant sustain an injury arising out of and in the course of his employment that resulted in a permanent impairment?
2. Did the ALJ err in awarding claimant permanent total disability benefits?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent is a Missouri construction company and in May 2009, was engaged in a storm sewer project for Home Depot Distribution Center in Topeka, Kansas. Claimant, a Missouri resident, has worked for respondent for about six years. Prior to that claimant operated his own excavating business for approximately 30 years. Claimant has a GED,

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<sup>1</sup> There was no reduction for preexisting impairment as a result of a Missouri accidental injury as ALJ Avery found respondent failed in its burden to establish the percentage of functional impairment and the record did not reflect what standards were used in Missouri at the time of claimant's award and whether they corresponded with those used in Kansas, i.e. the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition.

and has primarily worked as a heavy equipment operator. On May 28, 2009, claimant was operating an excavator while digging a ditch for placement of a storm sewer. The hole was approximately 27 feet deep. Claimant was operating the excavator at the edge of the hole cleaning out the bottom when the bank caved in and the excavator slid into the hole. The excavator dropped approximately 24 feet and came to rest on a trench box.<sup>2</sup>

The seat belt was disabled, and claimant grabbed the controls to hang on. Claimant struck a corner post where the door and window came together. He is uncertain what part of his body struck the post, but found himself "...sitting on the floorboard back against the corner post with my back."<sup>3</sup> A work crew saw what happened, and claimant immediately informed his supervisor, Leroy. Leroy asked claimant if he needed to see a doctor, but claimant declined and requested to keep working. Claimant told Leroy what happened and apologized for messing up his machine. Claimant finished out the day, but his back was hurting between his shoulder blades.

About a week after the accident, claimant was terminated. Claimant's back continued to get worse, and he went to see Dr. Mark Angles, his family doctor, on June 29, 2009. He complained of right flank pain with increasing severity of nausea and vomiting<sup>4</sup> and Dr. Angles attributed the back pain to possible claimant's heart problems so he referred claimant to a specialist.

Since 1991, claimant has been treated for coronary artery disease and other heart-related medical issues. Claimant then saw his heart specialist, who a few months earlier put in a stent and performed a heart bypass on claimant. It was discovered the stent was blocked, and on July 24, 2009, a coronary angiography, angioplasty, and stenting of the mid-right coronary was performed. Claimant is taking Plavix, a blood thinner, for his heart condition.

Claimant indicated he continued to experience back problems, and Dr. Angles thought this was a symptom of gallbladder issues. Claimant's gallbladder was not functioning properly and was removed. At that time, claimant had not told any of the physicians about the accident. However, claimant's medical records reveal his gall bladder was removed on July 7, 2009.

Because of complaints of right flank pain claimant was readmitted to the hospital on July 17, 2009 by Dr. Angles. While in the hospital, claimant underwent an MRI of the thoracic spine. On August 14, 2009, claimant was seen by Dr. Vincent Johnson, a pain

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<sup>2</sup> R.H. Trans. at 6-9.

<sup>3</sup> *Id.* at 10.

<sup>4</sup> Swaim Depo., Ex. 1 at 5.

specialist, for pain across his mid-back. Claimant indicated Dr. Vincent was the first physician who inquired if claimant had any kind of accident. Dr. Johnson gave claimant trigger point injections to the right thoracic and lumbar paravertebral muscles and the right latissimus dorsi. Claimant was diagnosed by Dr. Johnson with myofascial pain and thoracic spondylosis.<sup>5</sup> Currently claimant is taking Vicodin for his pain, which is prescribed by Dr. Angles.

In addition to his heart and gallbladder issues, claimant is an insulin-dependent diabetic. On April 25, 2009, about a month before the accident, claimant underwent an abdominal ultrasound because of abdominal pain, but the report showed a benign abdominal ultrasound. In 2004, claimant suffered a serious work-related head injury in an automobile accident, and received a worker's compensation settlement. As a result of the head injury claimant has incurred a loss of cognitive abilities, including memory loss. He also has experienced sensory change and weakness in his right arm as a result of the accident. Records from the Missouri Department of Labor indicate claimant's settlement was based on a 20% disability to the body as a whole.

At the request of claimant's attorney, Dr. Truett Swaim conducted a medical examination of claimant on September 9, 2009. He noted claimant had no history of pre-existing thoracic/costal pain similar to his current condition.<sup>6</sup> Dr. Swaim reviewed the MRIs taken on July 17, 2009, and noted some mild spondylitic changes between T3 and T7, moderate spondylitic changes at T8-T9 and T11-T12 and minimal bulging at T7-T8 and T11-T12 levels without impingement or narrowing of the spinal canal. The MRIs also revealed mild anterior wedging of the T6, T8, and T11 vertebra bodies, a hemangioma in the body of the T4 and T9 vertebra and a kyphotic deformity between T2 and T7. There was also a disc space narrowing with spondylosis and possible retrolisthesis at the C5-C6 level.

Dr. Swaim diagnosed claimant with "Chronic severe right thoracic/posterior costal pain, most likely related to degenerative changes in the thoracic spine and/or costal-vertebrae junction."<sup>7</sup> However, Dr. Swaim then indicated the occupational injury suffered by claimant on May 28, 2009, caused or was the prevailing factor to cause the necessity for the evaluation and treatment claimant has had for thoracic/costal pain since the injury occurred. Dr. Swaim indicated Dr. Johnson essentially diagnosed claimant with muscle pain and thoracic spondylosis. Dr. Swaim also testified the hemangioma, the kyphotic deformity and the spondylitic changes are degenerative in nature.<sup>8</sup>

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<sup>5</sup> *Id.* at 43.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.*, Ex. 1 at 12.

<sup>8</sup> *Id.* at 59-61.

Using the American Medical Association *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, Dr. Swaim opined “That using the AMA *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, Mr. Bartlett has a 10% permanent partial whole person impairment, due to the thoracic/costal condition. The occupational injury of May 28, 2009, Mr. Bartlett sustained working for Dennis Johnson construction, caused or was the prevailing factor to cause him to develop this permanent partial impairment.”<sup>9</sup>

Dr. Swaim testified claimant should restrict his occupational stresses to a light work level. Claimant should only exert 20 pounds of force occasionally and up to 10 pounds of force frequently, or a negligible amount of force to constantly move objects. Dr. Swaim also indicated claimant should avoid repetitive bending stooping, twisting, squatting, climbing and crawling. Claimant should be able to change positions frequently and avoid repetitive or forceful use of the upper extremities above shoulder height or extended away from the body. Finally, Dr. Swaim testified claimant should avoid vibrating or jarring equipment or tools.<sup>10</sup> Based upon the foregoing restrictions, Dr. Swaim opined claimant could not perform three of seven job tasks that claimant performed in the fifteen years prior to May 28, 2009.

Dr. Swaim indicated claimant has a pre-existing 20% permanent partial impairment disability to the body as a whole due to a closed head injury, a pre-existing 20% permanent partial impairment disability to the body as a whole due to a cervical spine injury, a pre-existing 20% permanent partial impairment disability to of the left arm due to a left shoulder injury a pre-existing 25% permanent partial impairment disability to of the right arm due to a right shoulder injury. Dr. Swaim testified claimant was given permanent restrictions by a Dr. Zimmerman in 2005 that resulted from claimant’s 2004 Missouri accident. The actual restrictions of Dr. Zimmerman were never placed in evidence. Claimant performed all seven job tasks after recovering from his 2004 Missouri accident until the accident on May 28, 2009. Consequently Dr. Swaim opined the claimant was not restricted by Dr. Zimmerman from performing those tasks.

On October 14, 2010, claimant underwent an independent medical examination by Dr. Vito J. Carabetta, a physical medical specialist. His impression was mid back pain. Dr. Carabetta’s IME report states:

The source of the patient’s complaints remains mysterious. He does describe a rather specific event, and it is indeed plausible that this could be the source of his remaining complaints in the region. The physical examination is actually devoid of any specific findings. . . We are not dealing with a myofascial problem. There are no findings for this on examination, and in addition he failed to respond to a trigger point injection approach that was indeed tried. It is possible that he may have had a deep bone

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<sup>9</sup>Swaim Depo., Ex. 1 at 13.

<sup>10</sup>Id., at 11.

contusion, and this would be something that generally would fail to demonstrate itself on the MRI scan of the thoracic spine that was indeed pursued in evaluating his condition. Assessment of impairment in his case would really only be based upon his subjective complaints. The patient does present himself in a rather forthright manner, and there is no doubt to question his credibility. . . As he is at maximum medical improvement, it is appropriate to address the level of residual permanent partial impairment. For this purpose, as been requested, the Fourth Edition of the *Guides to the Evaluation of Permanent Impairment*, published by the American Medical Association is utilized. The preferred DRE method is implemented. Table 74 on page 111 of the *Guides* is referenced. In that he has subjective complaints, but no objective findings, this would be a Category I presentation. By definition, there would be no measurable impairment. However, the patient does present himself in a straight forward manner, and I would suggest splitting the difference between a Category I and Category II with which we would expect to have objective findings that would be readily apparent. Therefore, I would recommend that his level of permanent partial impairment with regard to the specific injury be assessed to 2.5% whole person impairment. Based on the available information, this should be fully apportioned to the injury date in question of May 28, 2009.<sup>11</sup>

Dr. Carabetta indicated that upon examination, claimant had no tenderness in his thoracic spine and no tenderness when Dr. Carabetta pressed on the area. When asked about the functional impairment he assigned claimant, Dr. Carabetta testified:

Q. (Mr. Prichard) Okay. And I think you noted that the preferred DRE method is -- I guess is being used. What -- take me through the steps of what this means, the preferred DRE method is implemented?

A. (Dr. Carabetta) Well, the range of motion method can be used, but in this case it would get you nowhere because his mobility was fine in the area. And I don't like using the range of motion model in that with some individuals it's not going to be reliable. They're not going to give you their best measurements because they're trying to, either consciously or unconsciously, show that they're possibly more debilitated than they are. In his case he gave me his full movement and you can't use that because it just would come up with a zero. And I suspect he may actually have something, but we just don't know what it is. The diagnosis related estimate approach is based on what this particular diagnosis may be. And the categories are such that in theory he should fit with a Category I in that he has subjective complaints, but objectively, both on examination and diagnostic work-up, we came up empty. In theory, it should be a zero. I kind of felt for him with this accident and

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<sup>11</sup> Carabetta Depo., Ex. 2.

I kind of viewed him as a pretty straight shooter. And consequently, I gave myself a bit of latitude and I suggested splitting the difference.<sup>12</sup>

Upon further questioning, Dr. Carabetta stated:

Q. (Mr. Prichard) Okay. Now, Category I, what are the requirements for Category I?

A. (Dr. Carabetta) The Category I you have subjective complaints, but no objective findings. So in reality, he is a Category I.

Q. (Mr. Prichard) And if he was in Category I, what, according to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, what would his impairment - - permanent impairment rating be?

A. (Dr. Carabetta) It would be a zero.

Q. (Mr. Prichard) Okay. So while you did give Mr. Bartlett a two and a half percent whole person impairment, if you were to follow the Guides to the letter, you would have given him a zero?

A. (Dr. Carabetta) That is correct.<sup>13</sup>

Dr. Carabetta indicated that he placed no restrictions upon claimant, with regard to his thoracic spine.

**Did the claimant sustain an injury arising out of and in the course of his employment that resulted in a permanent impairment?**

At oral argument respondent's counsel acknowledged on May 28, 2009, claimant was injured in a work-related accident that arose out of and in the course of employment. Respondent's counsel urges this Board to reverse the ALJ and find claimant suffered no permanent impairment as a result of claimant's May 28, 2009 accident.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>14</sup> A claimant must establish that his personal injury was caused by an "accident arising out of

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<sup>12</sup> *Id.* at 15-16.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

and in the course of employment.”<sup>15</sup> The phrase “arising out of” employment requires some causal connection between the injury and the employment.<sup>16</sup> The existence, nature and extent of the disability of an injured workman is a question of fact.<sup>17</sup> The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.<sup>18</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>19</sup> Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker’s disability.<sup>20</sup>

Both physicians who testified, indicated claimant has a permanent functional impairment as a result of the accident on May 28, 2009. While respondent argues there are no objective findings that claimant has a permanent impairment, Drs. Carabetta and Swaim found claimant’s complaint of thoracic pain to be credible. Dr. Carabetta was employed by respondent to conduct a medical examination of claimant, and was in essence respondent’s expert witness. He found claimant to be a “straight shooter,” and split the difference between DRE Category I and Category II and gave claimant a 2.5% whole person functional impairment rating. The ALJ gave equal deference to Drs. Swaim and Carabetta’s opinions and found claimant has a 6.25% functional impairment to the body as a whole as a result of the May 28, 2009 accident.

This Board finds claimant did suffer an injury that arose out of and in the course of his employment on May 28, 2009, that resulted in a permanent functional impairment. Dr. Swaim, and respondent’s own expert, Dr. Carabetta, agree that claimant has a rateable permanent functional impairment as a result of claimant’s injury. The Board affirms the ALJ’s decision to give equal weight to the opinions of Dr. Swaim and Dr. Carabetta, and affirms his finding that claimant has a 6.25% impairment rating to the body as a whole as a result of the injury claimant suffered on May 28, 2009.

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<sup>15</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>16</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

<sup>17</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

<sup>18</sup> *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

<sup>19</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

<sup>20</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).



Dr. Carabetta was not asked to render an opinion regarding claimant's ability to return to work.<sup>21</sup> Dr. Swaim was the only physician that examined claimant who opined concerning claimant's ability to work. He restricted claimant to a light work level according to the U.S. Department of Labor, *Dictionary of Occupational Titles*.<sup>22</sup> Terry Cordray was the only vocational rehabilitation counselor that testified. He determined claimant engaged in 7 work tasks necessary to perform his various jobs during the 15 years prior to the accident.<sup>23</sup> Dr. Swaim opined claimant could not perform 3 of 7 work tasks, which constitutes a 43% task loss. At oral argument respondent's counsel stipulated to both the task loss and wage loss of the claimant as set out in the report of Mr. Cordray. At the time of the regular hearing claimant was not employed and thus has a 100% wage loss. Combining claimant's 43% task loss and 100% wage loss, this Board finds claimant has a work disability pursuant to K.S.A. 44-510e of 71.5%.

**Did the ALJ err in awarding claimant permanent total disability?**

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>24</sup>

In *Wardlow*<sup>25</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of

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<sup>21</sup> Carabetta Depo. at 21.

<sup>22</sup> Swaim Depo., Ex. 1.

<sup>23</sup> Cordray Depo., Ex. 2.

<sup>24</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>25</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In the 15 years prior to May 28, 2009, claimant was a business owner and backhoe operator. Mr. Cordray gave claimant the Wide Range Achievement test and the Wonderlic IQ test. Claimant has an IQ of 83, with an average IQ falling between 90 and 109. Claimant performed at fourth grade level in arithmetic and third grade level in reading. Mr. Cordray indicated claimant's aptitudes would only allow him to do unskilled entry level jobs and that he was permanently totally disabled.<sup>26</sup> Mr. Cordray also indicated claimant's age, his restrictions, the fact that he has no light duty skills and takes Vicodin, makes claimant unemployable.

Dr. Swaim also testified claimant is permanently totally disabled. He stated, "... considering the effects of all of his problems in terms of his pre-existing conditions and the condition arising from this occupational injury, I found he was most likely permanently and totally disabled."<sup>27</sup> Respondent presented no evidence to contradict the opinions of Dr. Swaim or Mr. Cordray. This Board finds claimant met his burden of proving by a preponderance of the evidence that he is permanently totally disabled.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>28</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board affirms the January 3, 2011, Award entered by ALJ Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2011.

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<sup>26</sup> Cordray Depo. at 13-15.

<sup>27</sup> Swaim Depo. at 16-17.

<sup>28</sup> K.S.A. 2010 Supp. 44-555c(k).

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John R. Stanley, Attorney for Claimant  
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge